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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

KATHLEEN C., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and BRENNAN A., Appellees.	2 CA-JV 2008-0108 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 14671500

Honorable Stephen M. Rubin, Judge Pro Tempore

AFFIRMED

Law Office of Richard Luff, PLC
By Richard Luff
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E S P I N O S A, Judge.

¶1 Appellant Kathleen C. appeals from the juvenile court's order terminating her parental rights to Brennan A., born February 1995, on all three grounds alleged by the Arizona Department of Economic Security (ADES) in its motion for termination of parent-child relationship: neglect or abuse, A.R.S. § 8-533(B)(2); mental illness and/or chronic substance abuse, § 8-533(B)(3); and length of time in care, § 8-533(B)(8)(a). We affirm for the reasons stated below.

¶2 We will not disturb a juvenile court's order terminating a parent's rights unless the order is clearly erroneous. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). On review, we view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the findings of fact upon which the court's order is based. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 20, 995 P.2d 682, 686 (2000). As long as at least one statutory ground has been established by clear and convincing evidence, we may affirm the order terminating a parent's rights. *Id.* ¶ 27.

¶3 Child Protective Services (CPS) first removed Brennan from Kathleen's home in August 2002, when he was seven years old. Kathleen was suffering from serious mental health issues, including depression, and was not caring for Brennan adequately. Brennan was initially placed with his father. In September 2003, Brennan's court-appointed guardian ad litem filed a dependency petition, alleging Brennan was dependent as to both parents, who were at the time involved in litigation over Brennan's custody. The juvenile court dismissed the dependency petition in January 2004, finding the matter should be addressed in the

pending domestic relations proceeding. At some point Brennan was returned to Kathleen, and in January 2005, Brennan's father relinquished his parental rights.

¶4 In January 2007, a month before Brennan turned twelve, he ran away from Kathleen's home. Brennan claimed he had been hit by Kathleen's live-in boyfriend, Casey, who is a level-three, registered sex offender. ADES removed Brennan from his mother's custody and filed a dependency petition. Brennan was placed in a group home and adjudicated dependent after Kathleen admitted allegations in an amended dependency petition. Among the allegations she admitted were that police officers had found her home "in disarray"; that she could not control Brennan, who had not been enrolled in school since May 2006; and that she had not provided ADES with documentation supporting her claim she was properly home-schooling him. The initial case plan goal was reunification, and ADES provided the family a variety of services. But that goal was changed to severance and adoption after a permanency hearing in December 2007. As directed, ADES filed a motion to terminate Kathleen's parental rights to Brennan. After a four-day contested hearing between February and December 2008, the juvenile court granted the motion and terminated Kathleen's parental rights.

¶5 Kathleen contends ADES failed to establish any of the statutory grounds for termination by clear and convincing evidence. With respect to § 8-533(B)(2), she contends ADES presented "[n]o evidence of abuse or neglect . . . other than the second-hand statements of the child." Kathleen relies, in part, on A.R.S. § 8-237, which provides that a minor's "out of court statements or nonverbal conduct . . . regarding acts of abuse or neglect

perpetrated on him are admissible for all purposes in any . . . termination . . . proceeding . . . if the time, content and circumstances of such a statement or nonverbal conduct provide sufficient indication of its reliability." Kathleen maintains Brennan's statements about having been abused and neglected "were often contradictory" and that Dr. Lorraine Rollins, the psychologist who evaluated Brennan, questioned his reliability.

¶6 A parent's rights may be terminated pursuant to § 8-533(B)(2) if "the parent has neglected or wilfully abused a child" or allowed another person to abuse or neglect the child when the parent knew or should have known this was occurring.

> "Neglect" or "neglected" means the inability or unwillingness of a parent . . . of a child to provide that child with supervision, food, clothing, shelter or medical care if that inability or unwillingness causes substantial risk of harm to the child's health or welfare, except if the inability of a parent or guardian to provide services to meet the needs of a child with a disability or chronic illness is solely the result of the unavailability of reasonable services.

A.R.S. § 8-201(21).

> "Abuse" means the infliction or allowing of physical injury . . . or allowing another person to cause serious emotional damage as evidenced by severe anxiety, depression, withdrawal or untoward aggressive behavior and which emotional damage is diagnosed by a medical doctor or psychologist . . . and is caused by the acts or omissions of an individual having care, custody and control of a child.

§ 8-201(2).

¶7 The record is replete with competent evidence that Kathleen neglected Brennan over a period of years. Brennan was adjudicated dependent because Kathleen had not been providing him with adequate food, clothing, or schooling. The first dependency proceeding

began in 2002 after school counselors reported Brennan's neglected condition, noting his hygiene was "worse than substandard." And, when he ran away in January 2007, resulting in the second dependency proceeding and ultimately this severance order, police officers said the home was "in disarray," "messy," "infested with rat droppings," and smelled of urine. Brennan reported he had no hot water, and there was little food in the home. He confirmed the officers' observations of rat droppings and stated the source of the urine smell was his mattress, which was "filled with [cat] urine." When Brennan was removed from Kathleen's custody in January 2007, he had not attended school since May of 2006, and when ADES enrolled him in school, he was significantly behind. He told Dr. Rollins his mother "got drunk 'most of the time'" and "s[aw] things" when she drank and that he had to be taken to his grandmother's home on one occasion.

¶8 Exposing Brennan to substantial risk, Kathleen had lived for over two years with Casey, knowing he was a registered sex offender. She also admitted she had told Casey "to bust [Brennan] on the butt," which she viewed as appropriate. Casey was prohibited by his probationary terms from having contact or living with a minor but lived with Kathleen nevertheless. His criminal history was lengthy, and he used methamphetamine and marijuana. When Brennan ran away, he reported that Casey had hit him, that Kathleen "put her relationship with [Casey] above her relationship with [him]," and that she failed to protect him from Casey." He was extremely angry about not having been sent to school regularly.

¶9 Additionally, Brennan was diagnosed with attention deficit hyperactivity disorder and oppositional/defiant disorder or possible bipolar disorder, yet Kathleen did not get him the assistance he needed, such as counseling and medication. Dr. Rollins opined Brennan was the victim of chronic neglect and that Kathleen was "primarily . . . responsible" for his condition and the stress he was under.

¶10 By asking this court to reject any evidence based on Brennan's reports of abuse and neglect, Kathleen is essentially asking us to reweigh the evidence. This we will not do. *See Jesus M.*, 203 Ariz. 278, ¶ 4, 53 P.3d at 205. Her suggestion that the juvenile court erred by considering Brennan's hearsay statements is not only waived because she did not make this precise argument below, it is without merit. *See Adrian E. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 96, ¶ 22, 158 P.3d 225, 231 (App. 2007). Clearly, § 8-237 gives the court the discretion to consider these statements if it determines they are sufficiently reliable. And, although Kathleen is correct that Dr. Rollins questioned Brennan's credibility to some degree, Rollins added in her report, "[T]he record does document that [Brennan] has been a victim of neglect . . . ." "The determination whether evidence is reliable in a specific case is left to the sound discretion of the juvenile court." *In re Jonah T.*, 196 Ariz. 204, ¶ 15, 994 P.2d 1019, 1023 (App. 1999). Kathleen provides no support for her suggestion that the court abused its discretion. There was ample evidence supporting the court's finding that ADES had proved this statutory ground for terminating Kathleen's rights. And because any one statutory ground is sufficient to sustain the court's order, we need not address Kathleen's

challenges to the sufficiency of the evidence for the other two grounds. *Michael J.*, 196 Ariz. 246, ¶ 27, 995 P.2d at 687.

¶11 We also reject Kathleen's contention the juvenile court incorrectly found that a preponderance of the evidence established termination of her parental rights was in Brennan's best interests. In determining whether termination of a parent's rights is in a child's best interests, the court must consider whether the child "would derive an affirmative benefit from termination or incur a detriment by continuing in the relationship." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 6, 100 P.3d 943, 945 (App. 2004). Therefore, "the best interests inquiry focuses primarily upon the interests of the child, as distinct from those of the parent." *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 37, 110 P.3d 1013, 1021 (2005). In its order terminating Kathleen's rights, the juvenile court found as follows:

> The minor requires a safe and permanent home. His mother is unable to provide such a home. The mother has completely failed to demonstrate that she can safely parent her son. She has accepted zero responsibility for what her son has had to endure in the form of physical abuse and neglect. She invited a Level Three Registered Sex Offender into her home and subjected her son to the potential danger of the sustained presence of a sex-offender in his home environment. She has expressed no regret for that decision and, again, accepts no responsibility for its impact on her son. It would, therefore, be a detriment to the minor child to deny the termination. The minor will benefit from a stable, permanent home with someone other than his mother.
>
> During the course of the litigation, for the most part, the minor has expressed adamantly that he does not want to have any contact with his mother of any kind. It would clearly be to the minor's detriment to require him to have contact with his mother at this point in time.

There is reasonable evidence in the record to support these findings. To the extent there were conflicts in the evidence with regard to Brennan's best interests, it was for the juvenile court, not this court, to resolve those conflicts. *See Jesus M.*, 203 Ariz. 278, ¶ 4, 53 P.3d at 205.

¶12 We reject, too, Kathleen's claim that the juvenile court erred in denying her motion to compel Brennan to testify. And we reject her related argument that the juvenile court's best-interests finding was flawed because, she claims, "[i]n a case involving a vocal [thirteen]-year old, the minor's position must be considered, the minor has a right to be heard, and all parties deserve the opportunity to examine and cross-examine the minor about that position."

¶13 It was for the juvenile court to determine, in the exercise of its discretion, whether Brennan should be required to testify. *See In re Yavapai County Juv. Action No. 9365*, 157 Ariz. 497, 500, 759 P.2d 643, 646 (App. 1988). The court concluded it would not be "appropriate to expose [Brennan] to examination and cross-examination[,] especially given his emotional state and the risk that such a confrontation would potentially create." There is no Sixth Amendment right to confrontation in parental severance proceedings. *See Kenneth T. v. Ariz. Dep't of Econ. Sec.*, 212 Ariz. 150, ¶¶ 20-24, 128 P.3d 773, 777 (App. 2006). Nor has Kathleen substantiated her claim that her due process rights were violated. That contention, like her claim that her equal protection rights were violated, is not supported by persuasive legal authority, nor is it borne out by the record. And, to the extent Kathleen is asserting that Brennan's "right to be heard" was violated, any such right belongs to Brennan, and Kathleen lacks standing to assert it. *Cf. In re Pima County Juv. Action No. S-*

113432, 178 Ariz. 288, 291, 872 P.2d 1240, 1243 (App. 1993) (father lacked standing to assert children should have separate counsel or guardian ad litem because of conflict between children).

¶14 Assuming, in any event, that Brennan's feelings about his mother and whether he wanted to be reunited with her were relevant to the best-interests finding, the court made clear in its minute entry it had considered Brennan's statements to others about not wanting to live with his mother, not feeling protected at home, and believing that Kathleen placed Casey first. The court was also aware Brennan was conflicted about this issue and in his feelings about his mother generally; he had expressed different feelings to others, reportedly changing his mind near the end of the severance hearing. His counsel made this clear at the hearing, stating Brennan had changed his mind "dramatically." The court weighed that evidence, together with other, compelling evidence that termination of Kathleen's parental rights was in Brennan's best interests.

¶15 Finally, we reject Kathleen's contention that Judge Patricia Escher, presiding judge of the juvenile court, erred by denying her motion for change of judge to remove Judge Stephen Rubin from the case on the ground that he had presided over the permanency hearing and found the evidence supported termination of her rights and that he was therefore biased against her and had prejudged the evidence. *See generally* A.R.S. § 12-409(B)(5) (party to civil action may request change of judge if party files affidavit stating party "has cause to believe and does believe that on account of the bias, prejudice, or interest of the judge he cannot obtain a fair and impartial trial"); Ariz. R. P. Juv. Ct. 2(A) (providing for change of

judge for cause in juvenile proceedings). As ADES points out, the basis for Kathleen's motion for change of judge and motion for reconsideration below were not entirely the same as her argument on appeal. Rather, she had contended below that Judge Rubin had demonstrated personal bias against her. She had asserted he was also presumably biased against her because there was no other "plausible explanation for Judge Rubin's failure to grant Mother and Child's request to postpone the severance proceedings [pursuant to Rule 59(B), Ariz. R. P. Juv. Ct.] and reinstitute a reunification plan," given that the "barriers" to reunification "either disappeared or [were] diminishing." Among those changed circumstances was Casey's mental breakdown and move out of Kathleen's home.

¶16 Notwithstanding that Kathleen has waived the arguments she raises for the first time on appeal, *see generally Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 21, 153 P.3d 1074, 1081 (App. 2007), the rules expressly anticipate that the same judge will hear the entire case, including the dependency proceedings, the permanency hearing, and the final termination hearing. *See* Ariz. R. P. Juv. Ct., 60, 64-66. Kathleen has not persuaded us that this practice is unsound or that it violated her due process rights. With respect to her argument Judge Rubin was purportedly biased against her personally, she has not established Judge Escher abused her discretion by denying the motion for change of judge. *See State v. Schackart*, 190 Ariz. 238, 257, 947 P.2d 315, 334 (1997) (appellate court reviews for abuse of discretion ruling on motion for change of judge for cause); *Anderson v. Contes*, 212 Ariz. 122, ¶ 5, 128 P.3d 239, 241 (App. 2006) (same). Judge Escher found the motion untimely and further found "the legal rulings which occurred during the conduct of this case were not

properly the subject of the motion for [c]hange of [j]udge for [c]ause." *See* Ariz. R. P. Juv. Ct. 2(A)(2). And Judge Virginia Kelly denied the motion for reconsideration of that ruling, confirming the propriety of Judge Escher's ruling. Kathleen likewise has not established Judge Kelly abused her discretion.

¶17 Nothing in the record establishes Judge Rubin was biased against Kathleen or that he failed to assess the evidence anew in determining whether it clearly and convincingly established the statutory grounds for termination and whether it established by a preponderance that terminating Kathleen's parental rights was in Brennan's best interests. *See State v. Henry*, 189 Ariz. 542, 546, 944 P.2d 57, 61 (1997) (judges presumed to be free from bias); *see also State v. Thomson*, 150 Ariz. 554, 558, 724 P.2d 1223, 1227 (App. 1986) (party seeking removal of judge for cause must establish bias or prejudice and "how any proclivity on the part of the trial court prejudiced him").

¶18 For the reasons stated herein, we affirm the juvenile court's order terminating Kathleen's parental rights to Brennan.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge